

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7434

United States Court of Appeals FOR THE SECOND CIRCUIT

In Re Franklin National Bank
Securities Litigation

JOSEPH J. KANNER, SOL NEIL CORBIN, as Trustee In Bankruptcy For FRANKLIN NEW YORK CORPORATION,

and

Plaintiffs,

FEDERAL DEPOSIT INSURANCE CORPORATION, Successor
In Interest To FRANKLIN NATIONAL BANK,

against

Plaintiff-Appellee,

RAYMOND T. ANDERSEN, JOSEPH A. BEISLER, CARLO BORDONI, HOWARD D. CROSSE, HAROLD V. GLEASON, WILLIAM J. HOGAN, SOL KITTAI, CHARLES H. KRAFT, WILLIAM B. LEWIS, JR., PAUL LUSTIG, MICHAEL J. MERKIN, NORMAN B. SCHREIBER, ROBERT N. SEARS, PETER R. SHADDICK, MICHELE SINDONA, JAMES C. SLAUGHTER, JAMES G. SMITH, JOHN J. TUC 'TY, FRANK G. WANGMAN, HAROLD A. WEBSTER, FASCO INTERNATIONAL HOLDING, S.A. INC.,

Defendants,

and

LOEWS CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

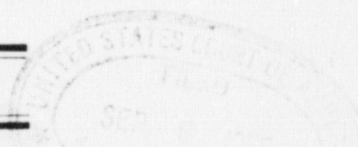
JOINT APPENDIX

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HUGHES HUBBARD & REED
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P/S



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DOCKET ENTRIES

DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMBER
50 207/1	685 75 0685	05 05 75	3	850	6			Not stated	0716		JUDD, J.

PLAINTIFFS

KANNER, Joseph J.

JOSEPH J. KANNER

and

F.D.I.C.

DEFENDANTS

ANDERSEN, Raymond T., et al

RAYMOND T. ANDERSEN, JOSEPH A. BEISLER, CARLO BORDONI, HOWARD D. CROSSE, HAROLD V. GLEASON, WILLIAM J. HOGAN, SOL KITTAI, CHARLES H. KRAFT, WILLIAM B. LEWIS JR., PAUL LISTIG, MICHAEL J. MERKIN, NORMAN B. SCHREIBER, ROBERT N. SEARS, PETER R. SHADDICK, MICHELE SINDONA, JAMES C. SLAUGHTER, JAMES G. SMITH, JOHN J. TUOHY, FRANK G. WANGMAN, HAROLD A. WESTER, PASCO INTERNATIONAL HOLDING, S.A., LOEW'S INC., FRANKLIN NATIONAL BANK and FRANKLIN NEW YORK CORPORATION.

CAUSE

VIOLATION OF THE SECURITIES EXCHANGE ACT
74c-894 relates
MDL#196

ATTORNEYS

For JOSEPH J. KANNER:
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40 West 57th Street
New-York, N.Y. 10019
757-5050

For FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF FRANKLIN NATIONAL BANK:
Hughes, Hubbard & Reed
One Wall Street
New York, N.Y. 10005
943-6500

<input type="checkbox"/> CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.C. NUMBER	CARD	DATE MAILED
				JS5	
				JS6	

UNITED STATES DISTRICT COURT DOCKET

DL 111 (Rev. 1/77)

A 2
Docket Entries

750 685 KANNER vs. ANDERSEN, et al

DATE	NR.	PROCEEDINGS	
05-05-75		Copy of order from the Judicial Panel on Multidistrict Litigation transferring above action to this court filed. - Copy of order mailed to Clerk, U.S.D.C.-S.D.N.Y. requesting files.	(1)
5-16-75		Cause on transfer received from U.S.D.C.-S.D.N.Y. filed.	(1)
5-19-75		Notice of motion ret 6-20-75 for an order pursuant to Rule 17 of FRCP filed with Memorandum in support. See 740 894.	--
6-10-75		Notice of motion ret 6-20-75 for an order to transfer this action to the Eastern District etc filed with Memorandum in support of motion.	(2/3)
6-13-75		Before JUD, J. - Case called. Pltff's motion to remand is withdrawn. Lefl. JUD's motion to remand granted. Decision reserved.	(4)
6-17-75		Steno. recorder's transcript dtd 6-13-75 filed.	(5)
6/20/75		Affidavit of Irving Bizar filed.	(6)
6-20-75		Affidavit of service of memorandum of law filed.	(6)
6-23-75		By JUDD, J. - Stipulation dtd 6-20-75 re agreement not to oppose the motion pending in MDL filed.	(7)
6-30-75		By JUDD, J. - Memorandum and order dtd 6-24-75 that the motion to remand be deemed withdrawn by the pltff, and that it is denied insofar as it was joined in by deft Loews Corp. filed. (p/c)	(8)
7-8-75		By JUDD, J. - Order dtd 7-7-75 granting motion for change of venue from U.S.D.C.-S.D.N.Y. to U.S.D.C.-E.D.N.Y. filed.	(9)
7-10-75		By JUDD, J. - Order dtd 7-8-75 that the motion of FDIC IS granted to the extent that in each of the captioned actions except Pergament, 1/ the receiver is realigned as party pltff, 2) that FDIC is substituted for the Receiver as party pltff, etc etc. See MDL 196 docu. #21.	--
7-10-75		By JUDD, J. - Memorandum dtd 7-8-75 re the above order filed. See MDL 196 docu. #22. (p/c mailed to attys)	--
7-11-75		Letter dtd 7-7-75 to J. Judd from Amalya L. Kearse filed.	(10)
7-16-75		Notice of motion ret 7-25-75 for an order dismissing the Pergament complaint etc filed with Memo of Law. See MDL 196.	--
7/29/75		Undertaking for Costs on Appeal filed.	(11)
8-7-75		Record on appeal certified and mailed to C of A.	
8-11-75		Acknowledgment rec'd from C of A for receipt of record on appeal and filed.	(12)
3-20-75		Copy of papers from SupCt/NY County filed as an exhibit.	(13)
3-20-75		Supplemental record on appeal certified and mailed to C of A.	--

A TRUE COPY
ATTEST
DATED August 20 1975
LEWIS ORGEL
CLERK
BY [Signature]
DEPUTY CLERK

COMPLAINT

SUPREME COURT: NEW YORK COUNTY

-----x
JOSEPH J. KANNER,

Plaintiff,

-against-

RAYMOND T. ANDERSEN, JOSEPH A. BEISLER,
 CARLO BORDONI, HOWARD D. CROSSE, HAROLD
 V. GLEASON, WILLIAM J. HOGAN, SOL KITTAI, C O M P L A I N T
 CHARLES H. KRAFT, WILLIAM B. LEWIS, JR.,
 PAUL LUSTIG, MICHAEL J. MERKIN, NORMAN
 B. SCHREIBER, ROBERT N. SEARS, PETER R.
 SHADDICK, MICHELE SINDONA, JAMES C.
 SLAUGHTER, JAMES G. SMITH, JOHN J.
 TUOHY, FRANK G. WANGMAN, HAROLD A. WEBSTER,
 FASCO INTERNATIONAL HOLDING, S.A.,
 LOEW'S, INC., FRANKLIN NATIONAL BANK
 and FRANKLIN NEW YORK CORPORATION,

Defendants.

-----x
 Plaintiff, by his undersigned attorneys, alleges,
 upon information and belief, except for paragraph 1 and 2
 which are alleged on knowledge.

FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a stockholder of defendant Franklin New York Corporation, having formerly been a shareholder of defendant Franklin National Bank, and has been such stockholder continuously and at the times of all the transactions complained of herein.

2. Plaintiff brings this action derivatively, in the right of and for the benefit of Franklin New York Corporation ("the Corporation" hereinafter) and on behalf of its subsidiary, Franklin National Bank ("Bank" hereinafter).

Complaint

3. Defendant Bank is a national bank and a federal corporation, and has been such throughout the times hereinafter alleged. The Bank maintains approximately 100 branches located in the City of New York and on Long Island and provides a wide range of banking and deposit services, with primary emphasis upon major commercial lending and other types of loans. The Bank also conducts international operations, and furnishes letters of credit, import and export financing, foreign exchange and other services. It conducts arbitrage operations in international money markets.

4. The Corporation owns all of the outstanding stock of Bank. Its main office is located in the County of New York.

5. The individual defendants were and still are directors and/or officers of both Corporation and Bank during the relevant times, except defendants Bardoni, Shaddick and Sindona who were and still are directors of Corporation only, and defendant Smith who was and still is a director of Bank only.

6. Defendant Fasco International Holding, S.A. ("Fasco" hereinafter) is a corporation organized and existing under the laws of the Principality of Lichtenstein. Defendant Sindona controls directly or indirectly all of the stock of Fasco.

7. Defendant Loew's Inc. is ("Loew's hereinafter) and throughout all the times hereinafter alleged was, a corporation organized and existing under the laws of the State of Delaware, qualified and authorized to do business in the

Complaint

State of New York and does business in said State. Its principal offices are located in the City of New York.

8. Prior to July 1972 when it sold to defendant Fasco all or almost all of its stock of Corporation, defendant Loew's owned approximately 22% of the outstanding stock of Corporation, and by virtue of said ownership was a dominant and controlling stockholder of Corporation and owed a fiduciary obligation to Corporation, Bank and all their shareholders.

9. As a result of the foregoing acquisition of stock of Corporation from defendant Loew's, defendants Sindona and Fasco controlled and dominated the affairs and operations of Corporation and Bank and thereby owed a fiduciary obligation to Corporation and Bank and all their shareholders.

10. Pursuant to such control, defendants Fasco and Sindona successfully arranged the election of defendants Bordoni and Slaughter as directors of Corporation and defendant Slaughter as a director of Bank. Defendant Bordoni was, and still is, a director of defendant Fasco and is otherwise affiliated with defendant Sindona. Defendant Slaughter was, among other things, President of Talcott National Corporation, another entity owned or controlled, directly or indirectly, by defendant Sindona.

11. Sometime after July 1972, defendants Sindona and Fasco became involved in the day to day operations of Bank, maintained offices at said Bank, and through their

1.

A 6
Complaint

domination of Bank and Corporation caused Bank and Corporation to engage in improvident, imprudent, unlawful and illegal transactions and activities which were not previously undertaken by Corporation and Bank. Such activities were not customarily undertaken by other banks. Such transactions and activities were undertaken without the required and customary investigation and supervision normally required of banks, their officers and directors.

12. The aforesaid activities were frequently entered into to favor or advantage defendants Sindona and his entities, and/or were transactions which were too risky or improper for Corporation and Bank to undertake..

13. Pursuant to the foregoing, Bank and Corporation were caused to do the following:

- (a) make improvident and an excessive number of loans, far more than good banking practice would permit. For example, the amount of loans outstanding in ratio to invested equity capital was at the end of 1973 in the amount of 30.9 to 1, as compared to Bank's prior debt ratio to invested equity capital of 20.4 to 1, and far more than any other major bank's debt ratio to invested equity capital throughout the United States. To obtain this result, non-bankable and questionable loans in large amounts were made to companies

Complaint

which defendant Sindona controlled or had interests in, and to others, and which at a later date Bank and Corporation have been forced to write off as uncollectible. It is also expected that in the future additional numbers of such loans will have to be written off as uncollectible;

- (b) caused Bank to participate in underwritings principally for the advantage and profit of defendants Sindona and Fasco. For example, Bank was required to participate in an underwriting of a sale of \$1,000,000,000 of eight year notes for an Italian governmental agency, advanced funds to a Bahamian financial institution controlled by Mr. Sindona to enable it to be in a position to participate in the underwriting and divide its underwriting fee with that institution;
- (c) caused Corporation to enter into agreements to acquire Talcott National Corporation an entity controlled, directly or indirectly, by defendant Sindona which acquisition was not in the best interests of Corporation. The proposed acquisition although later disapproved by the Federal Reserve Board in May 1974, caused Corporation to sustain losses of approximately \$825,000;

Complaint

(d) caused Bank to engage in trading international currency on a scale unprecedented in such amounts for any prudent and well run bank and without any of the normal, customary and usual standards for supervision of such transactions as to border on gambling. Such transactions were wasteful, imprudent, unlawful and illegal. Much of the trading took place with foreign banks in which defendant Sindona had direct or indirect interests. As a result of such activities, Bank sustained losses in excess of \$45,000,000.

14. The defendants, other than Bank and Corporation, knew or should have known of the impropriety of the foregoing transactions and could have discovered the transactions complained of in the ordinary course of their duties. They failed to make reasonable inquiries or undertake a reasonable investigation.

15. The foregoing caused substantial damage to Corporation and Bank and threatens their solvency. As a result, Bank may be compelled to liquidate or consent to be "taken over" by another bank at tremendous loss to it and damage to Corporation and its stockholders.

16. The acts complained of were the result of the dereliction of the defendants' duties as officers, directors, dominant and controlling stockholders and fiduciaries of Bank and Corporation and their shareholders, and their breach of common law, statute, rules and regulations of the Federal

A 9
Complaint

Reserve System and the National Banking Act which govern their conduct as officers, directors and fiduciaries.

17. The exact amount of the damages sustained by Bank and Corporation and the profits realized by the other defendants are unknown to plaintiff and can be determined only upon an accounting to be had in this action.

18. Demand has not been made upon the directors of Corporation to bring this action because such demand would be futile for the following reasons:

- (a) A majority, if not all, of the directors in office had knowledge of, and have authorized and participated in the transaction herein complained of;
- (b) Institution of this action by the present directors would place its conduct in hostile hands and would prevent its effective prosecution.

19. Demand has not been made upon the directors of Bank to bring this action for the same reasons set forth in paragraph 16 above. These directors have been designated by Corporation which has, in turn, been controlled and dominated by defendants Sindona and Fasco.

20. Demand upon the stockholders of Corporation to bring this action is unnecessary and would be futile because:

Complaint

- (a) The transactions complained of constitute a waste of corporate assets and a fraud upon the Corporation and its stockholders. The transactions are, therefore, incapable of ratification by a majority of the stockholders;
- (b) Under applicable law, the Charter and By-laws of the Corporation, the directors and officers and not the stockholders manage the affairs of the Corporation, including the bringing of actions on its behalf. The stockholders as a body cannot by resolution compel its management to bring suit;
- (c) A resolution of the stockholders directing that this action be brought, would place its conduct in the hostile hands of the individual defendants and the action could not be properly, faithfully or efficiently prosecuted;
- (d) Efforts to secure action by the Corporation would require a proxy fight with the individual defendants the expense of which would be prohibitive.

21. Plaintiff has made no demand upon the stockholders of Bank since all of its stock is owned by Corporation.

FOR A SECOND CAUSE OF ACTION

22. Repeats and realleges paragraphs 1 through 21 as though fully set forth herein.

Complaint

23. As a result of the foregoing, Bank's earnings have declined precipitously to the point that it has sustained losses of \$83 million dollars for the six months ended June 30, 1974 and the value of its stock and that of Corporation had declined substantially.

24. The foregoing conduct has caused substantial damage to Corporation and Bank and as a result the value of their assets depreciated substantially.

25. The sale to defendant Fasco by defendant Loew's of its 22% ownership in Corporation constituting 1,000,000 shares was at the price of \$40 per share. At the time of said sale, the market price for such shares averaged \$35 per share.

26. As a result of said sale, Loew's received a \$5,000,000 premium which was illegal and improper.

27. Defendant Loew's owed Corporation and its shareholders the duty of supervision and when it sold its control block of shares, said sale should have been made under such circumstances that purchasers would not have been in a position to put their interests paramount to that of the interests of Corporation. Defendant Loew's made the sale to defendants Fasco and Sindona without due and proper investigation or research into defendant Fasco and Sindona's true intent so as to prevent injury to Corporation and Bank.

A 12
Complaint

Had such investigations been made, Loew's would have determined that the sale should not have been made to defendant Fasco.

28. As a result of the foregoing, defendant Loew's should account to Corporation for the profits it made and the damages Corporation suffered.

WHEREFORE, plaintiff demands judgment as follows:

- (a) Requiring defendants to account for their profits and to reimburse the Corporation and Bank for their damages;
- (b) Awarding plaintiff the reasonable costs and expenses of this action, including counsel and accountants' fees; and
- (c) Granting such other and further relief as may be just.

DEMOV, MORRIS, LEVIN & SHEIN

ABRAHAM M. GLICKMAN

Attorneys for Plaintiff
40 West 57th Street
New York, New York 10019

(Tel. No.) 757-5050

NOTICE OF MOTION FOR ORDER SUBSTITUTING FEDERAL DEPOSIT
INSURANCE CORPORATION FOR FRANKLIN NATIONAL BANK

No note of issue has been
filed in this action and this
action is on the waiting list.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- x
JOSEPH J. KANNER, : Index No. 14091-1974
Plaintiff, : NOTICE OF MOTION FOR
- against - : ORDER SUBSTITUTING
RAYMOND T. ANDERSEN, et al., : PARTY
Defendants. :
----- x

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of
Amalya L. Kearse, sworn to the 12th day of November, 1974, and
upon the order of the Comptroller of the Currency of the United
States, a copy of which is annexed hereto, declaring defendant
Franklin National Bank ("Franklin") insolvent and appointing the
Federal Deposit Insurance Corporation ("FDIC") as receiver of
Franklin, the undersigned will move this Court, at a Special Term,
Part I thereof, to be held at the County Court House, 60
Centre Street, New York, New York, on November 22, 1974, at 9:30
o'clock A.M., or as soon thereafter as counsel can be heard, for
an order pursuant to Section 1017, Civil Practice Law and Rules,
substituting the FDIC as receiver of Franklin in the place and
stead of Franklin as a defendant herein, and that the title of

NOTICE OF MOTION

this action be amended accordingly, all without prejudice to all pleadings and proceedings heretofore had herein, and for such other and further relief as to the Court may seem just and proper.

November 12, 1974

Yours, etc.,

Hughes Hubbard & Reed

HUGHES HUBBARD & REED
Attorneys for the FDIC as
Receiver of Franklin
National Bank
One Wall Street
New York, New York 10005

TO:

DEMOV, MORRIS, LEVIN & SHEIN
Attorneys for Plaintiff
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CADWALADER, WICKERSHAM & TAFT
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SACHTELL, LIPTON, ROSEN & SEITZ
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New York, New York 10017

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
Attorneys for Defendants Raymond T.
Andersen, Howard D. Crosse, Harold V.
Gleason, William B. Lewis, Jr., Michael J.
Merkin, James G. Smith
140 Broadway
New York, New York 10005

AFFIDAVIT OF AMALYA L. KEARSE IN SUPPORT OF MOTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- x

JOSEPH J. KANNER,	:	Index No. 14091-1974
	:	
Plaintiff,	:	
	:	<u>AFFIDAVIT</u>
- against -	:	
RAYMOND T. ANDERSEN, et al.,	:	
	:	
Defendants.	:	

----- x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

AMALYA L. KEARSE, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and a member of the firm of Hughes Hubbard & Reed, attorneys for the Federal Deposit Insurance Corporation ("FDIC"), an agency of the United States Government, in its capacity as receiver of the defendant Franklin National Bank ("Franklin"). I make this affidavit in support of a motion by Franklin pursuant to Section 1017 of the Civil Practice Law and Rules for an order substituting FDIC as receiver of Franklin as a defendant in place of Franklin in the above-entitled action.

2. This action was commenced in August, 1974 derivatively on behalf of Franklin and Franklin New York Corporation, alleging breach of fiduciary duty.

Affidavit of Amalya L. Kearse in Support of Motion

3. On October 8, 1974, pursuant to his authority under 12 U.S.C. § 191, the Comptroller of the Currency of the United States declared Franklin to be insolvent, and terminated its powers as a national banking association. Pursuant to 12 U.S.C. § 1821(d), the Comptroller appointed the FDIC to be receiver of Franklin.

4. In accordance with its appointment as receiver, the FDIC has assumed control of Franklin's affairs.

WHEREFORE, the FDIC respectfully requests that the Court order substitution of the FDIC as receiver of Franklin as a defendant herein in place of Franklin, and that the title of this action be amended accordingly.

Amalya L. Kearse
Amalya L. Kearse

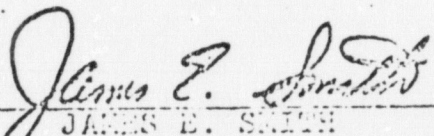
Sworn to before me this
13th day of November, 1974.

Notary Public
HILLINE CLASS
Notary Public, State of New York
No. 31-6535250
Qualified in New York County
Commission Expires March 30, 1976

CERTIFICATE OF THE COMPTROLLER OF THE CURRENCY

CERTIFICATE

I, JAMES E. SMITH, Comptroller of the Currency of the United States, do hereby certify that, as Comptroller, I have custody of the records of the Office of the Comptroller of the Currency, including those pertaining to Franklin National Bank, Brooklyn, New York, in receivership; and that annexed hereto is a true copy of the document by which the Comptroller announced that he had become satisfied that Franklin National Bank, Brooklyn, New York, was insolvent and by which he appointed the Federal Deposit Insurance Corporation receiver to proceed to close up the bank, all pursuant to 12 U.S.C. §§191 and 1821(c).


JAMES E. SMITH
Comptroller of the Currency

Dated: October 8, 1974

Certificate of the Comptroller of the Currency

No. 12997

TREASURY DEPARTMENT

OFFICE OF THE COMPTROLLER OF THE CURRENCY

NEW YORK, NEW YORK

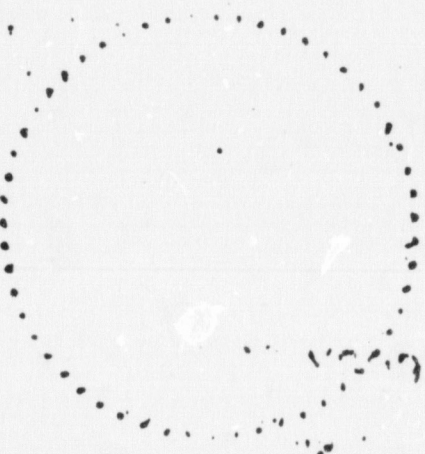
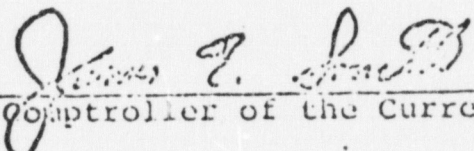
OCTODER 8 , 1974

3:00 P. M.

WHEREAS, from information available to this Office, I have become satisfied that Franklin National Bank, located in the City of Brooklyn, County of Kings, and State of New York, is insolvent and unable to meet the demands of its depositors and unable to pay its just and legal debts; and

WHEREAS, after due examination of the affairs of Franklin National Bank, I have determined that the Federal Deposit Insurance Corporation should be appointed receiver of the Bank:

NOW THEREFORE, I, James E. Smith, Comptroller of the Currency in pursuance of the power, duty, and authority vested in me by law do hereby appoint the Federal Deposit Insurance Corporation, Receiver of Franklin National Bank, with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the laws of the United States which authorize and direct the appointment of such Receiver.



Comptroller of the Currency

NOTICE OF FILING OF PETITION FOR REMOVAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- x

JOSEPH J. KANNER, :

Plaintiff, :

-against- :

Index No. 14091/74

RAYMOND T. ANDERSEN, JOSEPH A. BEISLER, :
CARLO BORDONI, HOWARD D. CROSSE, HAROLD :
V. GLEASON, WILLIAM J. HOGAN, SOL :
KITAY, CHARLES H. KRAFT, WILLIAM B. :
LEWIS, JR., PAUL LUSTIG, MICHAEL J. :
MERKIN, NORMAN B. SCHREIBER, ROBERT N. :
SEARS, PETER R. SHADDICK, MICHELE :
SINDONA, JAMES C. SLAUGHTER, JAMES G. :
SMITH, JOHN J. TUOHY, FRANK G. WANGMAN, :
HAROLD A. WEBSTER, FASCO INTERNATIONAL :
HOLDING, S.A., LOEW'S, INC., FRANKLIN :
NATIONAL BANK and FRANKLIN NEW YORK :
CORPORATION, :

NOTICE OF FILING
OF PETITION FOR
REMOVAL

Defendants. :

----- x

S I R S:

PLEASE TAKE NOTICE that a verified petition for removal of the above-entitled action from the Supreme Court of the State of New York, County of New York, to the United States District Court for the Southern District of New York, a copy of which is attached hereto, has this day been duly filed in the office of the Clerk of said United States District Court for the Southern

Notice of Filing of Petition for Removal

District of New York, pursuant to 12 U.S.C. § 1819 and 28 U.S.C. 1446.

Dated: New York, New York
December 12, 1974

HUGHES HUBBARD & REED
Attorneys for Defendant
Federal Deposit Insurance
Corporation as Receiver of
Franklin National Bank
One Wall Street
New York, New York 10005
(212) 943-6500

TO:

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Michael J. Merkin, James G.
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New York, New York 10005

WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for Defendant
Loew's Corporation
299 Park Avenue
New York, New York 10017

Notice of Filing of Petition for Removal

Clerk of the Court
Supreme Court of the State
of New York
County of New York
60 Centre Street
New York, New York

VERIFIED PETITION FOR REMOVAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

JOSEPH J. KANNER,	:	
	:	
Plaintiff,	:	Civil Action No.
	:	
-against-	:	<u>VERIFIED PETITION</u>
	:	<u>FOR REMOVAL</u>
RAYMOND T. ANDERSEN, JOSEPH A. BEISLER,	:	
CARLO BORDONI, HOWARD D. CROSSE, HAROLD	:	
V. GLEASON, WILLIAM J. HOGAN, SOL	:	
KITTAY, CHARLES H. KRAFT, WILLIAM B.	:	
LEWIS, JR., PAUL LUSTIG, MICHAEL J.	:	
MERKIN, NORMAN B. SCHREIBER, ROBERT N.	:	
SEARS, PETER R. SHADDICK, MICHELE	:	
SINDONA, JAMES C. SLAUGHTER, JAMES G.	:	
SMITH, JOHN J. TUOHY, FRANK G. WANGMAN,	:	
HAROLD A. WEBSTER, FASCO INTERNATIONAL	:	
HOLDING, S.A., LOEW'S, INC., FRANKLIN	:	
NATIONAL BANK and FRANKLIN NEW YORK	:	
CORPORATION,	:	
	:	
Defendants.	:	

----- x

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK:

Petitioner, Federal Deposit Insurance Corporation as
Receiver of Franklin National Bank, by its attorneys, Hughes
Hubbard & Reed, respectfully shows:

1. On or about August 26, 1974, an action was commenced against Franklin National Bank ("FNB") in the Supreme Court of the State of New York in and for the County of New York, entitled JOSEPH J. KANNER, Plaintiff, against RAYMOND T. ANDERSEN, JOSEPH A. BEISLER, CARLO BORDONI, HOWARD D. CROSSE, HAROLD V. GLEASON, WILLIAM J. HOGAN, SOL KITTAY, CHARLES H. KRAFT, WILLIAM B. LEWIS, JR., PAUL LUSTIG, MICHAEL J. MERKIN, NORMAN B. SCHREIBER, ROBERT N. SEARS, PETER R. SHADDICK, MICHELE SINDONA, JAMES C. SLAUGHTER, JAMES G. SMITH, JOHN J. TUOHY, FRANK G. WANGMAN, HAROLD A. WEBSTER, FASCO INTERNATIONAL HOLDING, S.A., LOEW'S, INC., FRANKLIN NATIONAL BANK and FRANKLIN NEW YORK CORPORATION,

Verified Petition for Removal

Defendants (the "action") by the service upon FNB of a summons and complaint.

2. Until October 8, 1974 FNB was a national banking association organized under the laws of the United States, 12 U.S.C. § 21 et seq.

3. On October 8, 1974, pursuant to his authority under 12 U.S.C. § 191, the Comptroller of the Currency of the United States declared FNB to be insolvent, and terminated its powers as a national banking association. Pursuant to 12 U.S.C. § 1821(c), the Comptroller appointed the Federal Deposit Insurance Corporation ("FDIC") to be receiver of FNB.

4. In accordance with its appointment as receiver, the FDIC assumed control of the affairs of FNB.

5. On November 12, 1974 the FDIC served upon all parties to the action a notice of motion for substitution of the FDIC as Receiver of FNB as a defendant in the action in place of FNB, pursuant to § 1017 of the Civil Practice Law and Rules of the State of New York.

6. On November 12, 1974 the FDIC's motion for substitution was submitted for decision to the Supreme Court of the State of New York in and for the County of New York.

7. The plaintiff did not oppose the FDIC's motion for substitution.

8. The FDIC's motion for substitution was granted by memorandum opinion of Justice Gellinoff dated December 5, 1974, a copy of which is annexed hereto.

9. The action is one of which this Court has original jurisdiction under the provisions of 12 U.S.C. § 1819, and is one which may be removed to this Court by the FDIC pursuant to the provisions of 12 U.S.C. § 1819, in that it is a suit of a civil

Verified Petition for Removal

nature to which the FDIC is a party, not involving the FDIC in its capacity as receiver of a state bank.

10. Under the provisions of 12 U.S.C. § 1819 the FDIC is not required to file herewith a bond or security.

11. In addition, the action is one of which this Court has original jurisdiction under the provisions of 28 U.S.C. § 1348 and is removable pursuant to 28 U.S.C. § 1441(b). Under the provisions of 28 U.S.C. § 2408 the FDIC is not required to file herewith a bond or security.

12. Annexed hereto is a copy of all process and pleadings served upon FNB and petitioner FDIC as receiver of FNB in the action. Upon information and belief, no orders have been served upon either of them.

WHEREFORE, defendant FDIC as Receiver of Franklin National Bank prays that the action now pending in the Supreme Court of the State of New York in and for the County of New York be removed therefrom to this Court.

Dated: New York, New York
December 12, 1974

HUGHES HUBBARD & REED

By Analya L. Kease
A Member of the Firm
Attorneys for the Federal
Deposit Insurance Corporation
as Receiver of Franklin
National Bank
One Wall Street
New York, New York 10005
(212) 943-6500

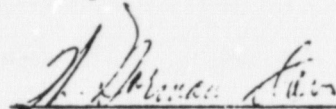
Verified Petition for Removal

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

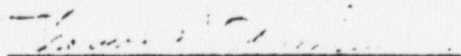
W. Norman Davis, being duly sworn, deposes and says:

I am Associate Liquidator, Federal Deposit Insurance Corporation, petitioner in the foregoing petition. I have read the petition and know the contents thereof. The same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my information and the grounds of my belief, as to all matters not therein stated upon knowledge, are the contents of the summons and complaint in this action and documents contained in the files of the petitioner.



Sworn to before me
this 12 day of January, 1974.


Notary Public

THOMAS R. O'KEEFE
Notary Public, State of New York
No. 2570720
Qualified in Nassau County
Term Expires March 30, 1975

Kanner Complaint Annexed to Verified
Petition For Removal

Identical to Complaint set forth herein
at pages A 3 to A 12

DECISION OF GELLINOFF, ANNEXED TO
VERIFIED PETITION FOR REMOVAL

12/5/79

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: ABRAHAM J. GELLINOFF
Hon. _____ Justice.

Joseph J. Kanner

— against —

Raymond T. Andersen, et al

SUBMITTED

The following papers numbered 1 to 3 read on this motion,

No. 1 on Calendar of

NOV 22 1979

Notice of Motion - Order to Show Cause - and Affidavits Annexed

Answering Affidavit NO PAPERS SUBMITTED

Replying Affidavit IN OPPOSITION TO SPECIAL

_____ Affidavit

_____ Affidavit

Pleadings — Exhibit

Stipulation — Referee's Report — Minutes

Filed Papers

PAPERS NUMBERED

1-3

Upon the foregoing papers this Plaintiff's motion to substitute the

Federal Deposit Insurance Corporation as Receiver of Franklin

National Bank, in place of Franklin in this action, is granted without
opposition. Settle order.

Dated 12/5/79

J.S.C.

Briefs: Plaintiff's _____ Defendant's _____ Petitioner's _____ Respondent's _____ Relator's _____

Briefs

County C. W. No. 14091, 19 79
Spec. I. Ltr. 178, Line 7, 19 79

NOTICE OF MOTION FOR AN ORDER
REMANDING THE KANNER ACTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
JOSEPH J. KANNER,

Plaintiff,

-against-

RAYMOND T. ANDERSEN, et al.,

Defendants.
-----x

NOTICE OF MOTION

74 Civ. 5440

(L.W.P.)

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affidavit of IRVING BIZAR, sworn to December 16, 1974, the petition for removal of the Federal Deposit Insurance Corporation as Receiver of Franklin National Bank, dated December 12, 1974, the complaint and prior proceedings herein, the undersigned will move this Court, at Room 36, on December 30, 1974 at 10:00 A.M., or as soon thereafter as counsel can be heard for an order pursuant to 28 U.S.C. Section 1447(c) remanding the above captioned action to the Supreme Court of the State of New York, County of New York, and for such other and further relief as the Court may deem just and proper.

Dated: December 16, 1974.

ABRAHAM M. GICKMAN

DEMCOV, MORRIS, LEVIN & SHEIN

By: Abraham M. Gickman
A Member of the Firm
Attorneys for Plaintiff
40 West 57th Street
New York, New York 10019

TO:
MESSRS. HUGHES, HUBBARD & REED
Attorneys for Federal Deposit
Insurance Corporation, as Receiver
of Franklin National Bank
1 Wall Street
New York, New York 10005

Notice of Motion for an Order
Remanding the Kanner Action

MESSRS. CADWALADER, WICKERSHAM & TAFT
Attorneys for Defendant Franklin New York Corporation
One Wall Street
New York, New York 10005

MESSRS. DEWEY, BAYLANTINE, BUSHBY, PALMER & WOODS
Attorneys for Defendants Andersen, et al.
140 Broadway
New York, New York 10005

MESSRS. WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for Defendant Loew's Corporation
299 Park Avenue
New York, New York 10017

AFFIDAVIT OF IRVING BIZAR IN
SUPPORT OF MOTION FOR REMAND

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
JOSEPH J. KANNER,

Plaintiff,

-against-

RAYMOND T. ANDERSEN, et al.,

Defendants.

SUPPORTING AFFIDAVIT

Civil Action No.

74 Civ. 5440

(L.W.P.)

-----x
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

IRVING BIZAR, being duly sworn, deposes and says:

I am a member of the Bar of this Court and of the firm of Demov Morris, Levin & Shein, co-counsel with Abraham M. Glickman to the above named plaintiff. I am familiar with the facts and prior proceedings herein and submit this affidavit in support of the annexed motion to remand the above captioned case to the Supreme Court of the State of New York, County of New York.

This action was commenced in August 1974 in the New York State Supreme Court, County of New York, on behalf of Franklin National Bank and Franklin New York Corporation alleging, inter alia, a single derivative action on behalf of Franklin New York Corporation and double-derivatively, on behalf of Franklin National Bank. The action claim violations by directors, officers and others of fiduciary duties. Included among the claims is the charge that defendant

Affidavit of Irving Bizar in
Support of Motion for Remand

Loew's secured an illegal and inappropriate premium for the sale of its controlled block of stock in Franklin New York Corporation to defendants Sindona and Pasco International Holding, S.A.

As is readily apparent from the complaint herein, plaintiff presents no federal question; rather, his action presents claims for state and common law violations.

While the above captioned action was pending in the state court, various defendants filed motions addressed to the complaint. In connection with those motions, FDIC, the appointed Receiver of Franklin National Bank (appointed after this action was commenced), filed papers, on or about November 13, 1974, in support of certain of the defendants' motions and appeared to argue in support of a motion made by defendant Loew's at or about the same time. The motion of defendant Loew's was denied by the state court.

The basis for the removal is the claim by FDIC of the applicability of 12 U.S.C. Section 1819. FDIC also claims the right to remove under 28 U.S.C., Section 1348.

It is respectfully submitted that 12 U.S.C. Section 1819 and 28 U.S.C. Section 1348 are inapplicable. The FDIC is not a real or actual defendant in this action. It appears only in its capacity as a Receiver for defendant Franklin National Bank, which is itself, not a real or actual defendant. Franklin National Bank is only a nominal defendant on whose

Affidavit of Irving Bizar in
Support of Motion for Remand

behalf the action is brought. No claim for relief is asserted
against either FDIC or Franklin National Bank.

Finally, it may be noted that none of the other
defendants have joined in the petition for removal.

WHEREFORE, it is respectfully requested that
plaintiff's motion for remand be granted.

Sworn to before me this
16 day of December, 1974.

Meredith B. Bizar
MILORNO E. BIZAR
NOTARY PUBLIC, State of New York
No. 41-1850351 Queens County
Ex. 11000 filed in New York County
Ex. 11000 Expires March 30, 1975

Irving Bizar

STENOGRAPHER'S TRANSCRIPT DATED JUNE 13, 1975
OF ARGUMENT ON MOTION TO REMAIND BEFORE JUDD, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JOSEPH J. KANNER :

Plaintiff :

-against :

75 C 685

RAYMOND T. ANDERSEN et al., :

Defendants :

-----X
United States Courthouse
Brooklyn, New York

June 13, 1975
2:00 p.m.

B e f o r e :

HONORABLE ORRIN G. JUDD,

U. S. D. J.

SHELDON SILVERMAN
Acting Official Court Reporter

Appearances:

HUGHES, HUBBARD & REED, Esqs.
Attorneys for FDIC
One Wall Street
New York, N.Y. 10005

By: AMALYA L. KEARGE, Esq.
-and-
SUSAN THORNER, Esq.

BARRET, SMITH, SHAPIRO & SIMON, Esqs.
26 Broadway
New York, N.Y. 10004

By: MICHAEL O. FINKELSTEIN, Esq.
-and-
RICHARD BLAKER, Esq.

WACHTEL, LIPTON, ROSEN & KATZ, Esqs.
Attorneys for Loews
299 Park Avenue
New York, N.Y. 10017

By: HERBERT M. WACHTELL, Esq.
-and-
ALLAN A. MARTIN, Esq.

DEMOV, MORRIS, LEVIN & SHEIN, Esqs.
Attorneys for Kanner
40 West 57th Street
New York, N.Y. 10019

By: RAYMOND S. FERSKER, Esq.

1 THE COURT: Are you taking Mr. Armstrong's
2 place this afternoon?

3 MR. FINKELSTEIN: Yes.

4 THE COURT: What is the trustee's position?

5 MR. FINKELSTEIN: We are now moving in the
6 Bankruptcy Court, your Honor, for permission to take
7 over the Kanner case as well as the other derivative
8 actions, and I regret we don't yet have permission.
9 We expect to have it the first part of next week
10 and at that time, with your Honor's leave, we would
11 like to submit a formal motion pursuant to the
12 motion Miss Kearse has submitted for the FDIC, to
13 take over these cases.

14 THE COURT: Has that been made before Judge
15 Galgay?

16 MR. FINKELSTEIN: At our request, just filed.

17 THE COURT: What has happened with respect
18 to it? Has there been a hearing, papers?

19 MR. FINKELSTEIN: This is by bankruptcy
20 counsel. I believe it's a pro forma matter that's
21 submitted ex parte on the petition of the trustee.
22 If your Honor would not object, we would like to
23 submit formal papers on that the first part of next
24 week.

25 THE COURT: Mr. Fersker, it's your motion.

Stenographer's Transcript Dated June 13, 1975

1 Did you want to add anything to the papers on it?

2 MR. PERSKER: We would like to withdraw the
3 motion.

4 THE COURT: Who is here from Loews?

5 MR. WACHTELL: I am, your Honor.

6 THE COURT: Mr. Wachtell?

7 MR. WACHTELL: Yes.

8 THE COURT: What's your position under those
9 circumstances?

10 MR. WACHTELL: Your Honor--

11 THE COURT: Do you have anything written to
12 submit on this, Mr. Persker?

13 MR. PERSKER: No.

14 THE COURT: Is this your authorized
15 statement?

16 MR. PERSKER: Last minute decision; because
17 all the other cases are over here I think it's a
18 pragmatic decision under these circumstances.

19 MR. WACHTEL: Your Honor, our position is
20 somewhat complex and if I can take about two moments
21 I can sketch it for your Honor. We originally
22 joined in the plaintiff's motion to remand at a
23 time when this action was over in the Southern
24 District, and we did so at that time basically both
25 because we felt that position sound as a matter of

Stenographer's Transcript Dated June 13, 1975

1 law and because as a litigant we desired to be back
2 in the State Court and felt that at least insofar
3 as this case was a claim against Loews, that it was
4 a single count, garden variety, common law, state
5 claim which, frankly, did not belong in Federal Court.

6 I did not know that Demov & Morris was with-
7 drawing their motion today; however, we, on our own,
8 had reached the conclusion that from a litigation
9 point of view on behalf of our client, given the
10 action of the multi-district panel, and given the
11 increased role that I think it is clear that the
12 FDIC and the trustee are going to be taking in this
13 entire situation, that probably we'll be perfectly
14 happy to be here before your Honor, and I'm perfectly
15 happy to be here before your Honor; however, although
16 my litigation posture has therefore altered my
17 intellectual difficulty with this Court's subject
18 matter jurisdiction upon removal has not, and I think
19 this is a case where notwithstanding the desires of
20 plaintiff's counsel and even notwithstanding my own
21 desires, I recognize that this Court must satisfy
22 itself of its own subject matter jurisdiction and
23 that there would be very little point for what is
24 conceivably a lengthy litigation to go forward, only
25 to have it held years down the pike that this court

Stenographer's Transcript Dated June 13, 1975

1 does not have jurisdiction and that it's not waivable.

2 I'm here with mixed feelings. I want to be
3 here and I don't think I'm entitled to be here.

4 Frankly, I'm available to be of assistance to the
5 Court, to respond. We of course have briefed the
6 issue fairly thoroughly initially. The circum-
7 stances have somewhat changed, being rendered more
8 complex by the motions that have been made by the
9 FDIC, although not ruled upon yet, and the one
10 indicated by Mr. Finkelstein will be made by the
11 bankruptcy trustee to realign poses still further
12 complications on the question of removal, I'm not
13 sure which way, although probably makes removal
14 more difficult.

15 THE COURT: I think some of the cases you
16 have cited indicate that the removal court raised
17 the question sui sponte about its jurisdiction.

18 MR. WACHTEL: I think that is true. It is
19 this Court's obligation. I have a serious question
20 as to the propriety of removal here. That doubt
21 has not gone away. I still have it. I think the
22 question is a close one. It can be said, well,
23 this is all really irrelevant because could not
24 the FDIC bring a fresh action in this court at the
25 time?

1 THE COURT: This is the only action in which
2 Loews is.

3 MR. WACHTEL: The only action in which Loews
4 is involved. The fact that the FDIC--

5 THE COURT: Excuse me. At the time it was
6 removed Loews was a defendant. There was no cross
7 claim against Loews by Franklin.

8 MR. WACHTEL: That's correct.

9 THE COURT: Or by Franklin, New York.

10 MR. WACHTEL: That's correct; simply the
11 original complaint, then a motion to dismiss pending
12 by Loews in the state court at the time of the removal
13 petition.

14 I really don't quite know what I would
15 recommend that this Court do. One alternative
16 which is almost perhaps in a way could be viewed
17 as begging the question a bit, but it might be a
18 sound solution. This is a very close question.
19 If your Honor were to order remand, that decision
20 is not reviewable, either by way of appeal,
21 mandamus, or any other way. If your Honor were to
22 deny remand and were to be persuaded--and I don't
23 know that your Honor is--that this is really a
24 close question and that it would be a mistake to
25 have a litigation going on for a long period of

1 time only to find that the court did not have
2 jurisdiction in the first instance, then it might
3 be an extremely sound procedure to certify an
4 interlocutory appeal.

5 THE COURT: Yes.

6 MR. WACHTELL: The issues here that I think
7 are very close are not only the procedural question
8 of whether removal is permissible for only one out
9 of twenty-four defendants joined in the petition,
10 but there is the substantive law question, even if we
11 were to assume hypothetically that all twenty-four
12 defendants or the other twenty-three defendants had
13 chosen to join with the FDIC in seeking removal
14 to the federal court, there is the unresolved
15 substantive law question of whether the federal
16 courts recognize a pendent party doctrine as dis-
17 tinct from a pendent cause of action doctrine.

18 THE COURT: Whose cause of action is it that's
19 asserted against Loews? It is a cause of action
20 on behalf of Franklin, New York, is it not, rather
21 than on behalf of Franklin National Bank?

22 MR. WACHTELL: I think probably if one were
23 to parcel out the original complaint, it purports
24 to be on both. In the first instance it's clearly
25 on behalf of Franklin New York, the stockholders of

Stenographer's Transcript Dated June 13, 1975

1 of New York. It pertains rightly or wrongly on the
2 face of it, of a double derivative cast, and also
3 purports to allege a claim against--on behalf of
4 the bank, and I think that it is because--

5 THE COURT: What's the bank's claim against
6 Loews?

7 MR. WACHTELL: I don't think anybody has a
8 claim against Loews. I don't know what the bank's
9 claim against Loews would be. Loews was a stock-
10 holder of the parent company. My own thinking
11 would be that were there a cause of action against
12 Loews--needless to say, I do not think that there
13 is by any party--but were there a cause of action
14 by Loews, I think it would be the trustee's cause
15 of action, and the trustee, unlike the FDIC, does
16 not have an independent basis of federal jurisdiction
17 herein. In other words, the trustee could not come
18 into this court today with a fresh complaint in this
19 action.

20 THE COURT: It's a little odd. The complaint
21 says, "The foregoing conduct has caused substantial
22 damage to corporation and bank." But it seems to
23 refer primarily to the action of the directors, and
24 then when it goes to Loews and says Loews got a
25 premium, it says, "Loews owed corporation and

1 its shareholders the duty of supervision, and Loews
2 should account to the corporation for the profits
3 it made." That might have some bearing on the
4 removal question. Consequently I'm pursuing it.

5 MR. WACHTELL: It does, and your Honor is
6 reading it closely, and this complaint is far from
7 a model of clarity. In the Wherefore clause it says
8 "Plaintiff demands judgment as follows," and then
9 (a) is requiring defendants, which, at least arguably,
10 includes Loews.

11 THE COURT: Except there are two causes of
12 action. The others are in the first clause.

13 MR. WACHTELL: As seeking-- Well, I read
14 it the way your Honor reads it.

15 THE COURT: Let me hear what Miss Kearse
16 has to say.

17 It seems to me, Miss Kearse, some of the
18 cases seem to indicate the United States, or a
19 federal agency, had to have joinder by other
20 defendants in order to remove a nonseparable cause
21 of action.

22 MS. KEARSE: I believe, your Honor, the
23 cases that say that are cases which did not involve
24 a special removal statute. For instance--

25 THE COURT: The problem is the removal statute.

1 although special in naming FDIC, refers you to the
2 procedures in the Judicial Code.

3 MS. KEARSE: That's quite true, your Honor,
4 but I submit that a requirement that the consent
5 of another party be obtained is not a requirement
6 of procedure but a requirement of substance.

7 Let me pose a hypothetical situation. Suppose
8 after FDIC had been appointed receiver it had made
9 a motion to be substituted in the current action
10 and to be realigned as a party plaintiff, and that
11 motion--both of those motions--had been granted
12 within the thirty-day period, and FDIC then removed
13 the action--

14 THE COURT: Then you would have a problem
15 because the plaintiff can't remove, and FDIC may
16 sue in the state court.

17 MS. KEARSE: The removal provision that we're
18 dealing with in Section 1819 says that the court
19 has jurisdiction of any action, to which FDIC is
20 a party, and FDIC can remove any such action to
21 the district court. It doesn't say it can remove
22 any action to which FDIC is a defendant. It says
23 it can remove any action to which it is a party.

24 THE COURT: You think that overrides 1442
25 or whatever it is-- No, 1442 is a special one, I'm

1 not sure applies.

2 MS. KEARSE: 1442 deals with federal officers.

3 THE COURT: Yes.

4 MS. KEARSE: But I say this provision of
5 1819, which was added to Section 1819 in 1966, is
6 a special provision which by its terms gives FDIC
7 to remove any action to which it is a party, whether
8 it's a plaintiff or defendant or nominal defendant
9 or any sort of a party to federal court.

10 Suppose it were a plaintiff, had the right
11 to remove as a party, I suggest that reading the
12 portion of 1819, which says that the other procedures
13 should apply, to mean that the consent of all the
14 defendants has to be obtained would produce an
15 absurdity.

16 If FDIC would have a right to remove as a
17 plaintiff, which I think it does, it clearly would not
18 have to get the consent of all the defendants. This
19 is a case where--

20 THE COURT: You have developed some new ideas
21 since you wrote your brief, I think. I didn't find
22 that in my reading of your brief.

23 MS. KEARSE: That was not in our brief, your
24 Honor. I think it's a hypothetical situation which
25 does point up--

1 THE COURT: Suppose you make yourself a
2 plaintiff, you can't be a complete plaintiff in this
3 action, can you, because this involves damages to
4 the corporation as well as to the bank.

5 MS. KEARSE: If your Honor means we cannot
6 be the only plaintiff, that may be, but I still
7 don't think that affects the provisions in Section
8 1819.

9 THE COURT: If you're a plaintiff, you can
10 remove the entire case?

11 MS. KEARSE: Yes. I suggest, your Honor--

12 THE COURT: Is there any legislative history?
13 FDIC counsel must have had some reason for putting
14 it in. You say this is a 1966 amendment.

15 MS. KEARSE: Yes, it is, your Honor. We
16 were not able to find any legislative history nor
17 any cases which construed these provisions since
18 their insertion in 1966.

19 THE COURT: What is your claim, if a /, against
20 Loews?

21 MS. KEARSE: Well, your Honor, we have not
22 really had adequate opportunity to explore it
23 thoroughly, but the complaint does allege that
24 damage was done to the bank, that Loews had an
25 obligation not to make the sale of its controlling

Stenographer's Transcript Dated June 13, 1975

1 interest to Pasco and Sidona without proper
2 investigation or research into Pasco's and Sidona's
3 true intent so as to prevent injury to the corpora-
4 tion and the bank. Whether or not the bank has a
5 claim against Loews is a different question from
6 whether or not a claim against Loews on behalf of
7 the bank is asserted. It's clear that one is
8 asserted in the complaint. The Wherefore clause--

9 THE COURT: I guess I was reading just the last
10 part of it. You're in some of the first paragraphs--

11 MS. KEARSE: The last sentences of Paragraph
12 27, which is in the second cause of action.

13 THE COURT: I didn't read it as closely then
14 as Mr. Wachtell said. It says that the defendant
15 owes Loews Corporation and its shareholders the duty.

16 MS. KEARSE: Then it goes on in the second
17 sentence--

18 THE COURT: The second sentence...to prevent
19 injury to corporation and bank.

20 MS. KEARSE: Whether or not there is a claim
21 that belongs solely to the bank or to the bank and
22 the corporation or solely to the corporation is a
23 question, I think, has to be reserved until proper
24 investigation has been made into the law and the
25 merits, but the fact seems clear that the claim has

Stenographer's Transcript Dated June 13, 1975

1 been alleged. It has been alleged that conduct by
2 Loews injured both the corporation and the bank
3 and I'm not prepared to get into the question of
4 the merits at this point.

5 THE COURT: I understand.

6 Where does it say that the FDIC can remove
7 as a plaintiff?

8 MS. KEARSE: Section 1819 says, "All suits
9 of a civil nature at common law or equity to which
10 the corporation shall be a party shall be deemed to
11 arise under the laws of the United States and the
12 district courts shall have original jurisdiction
13 thereof and the corporation may remove any such
14 action to the district court."

15 THE COURT: You're asking me really to make
16 some new law, that this means the plaintiff can
17 remove.

18 MS. KEARSE: It's a question of first impres-
19 sion with respect to Section 1819. Now, sir, there
20 is some parallel authority in the case of the
21 Federal Savings and Loan Insurance Corporation which
22 has a similar jurisdiction and removal provision,
23 which says, "The corporation may without bond or
24 security remove any such action." and the antece-
25 dent to such action is the provision that any

1 proceeding to which the corporation shall be a party
2 shall be deemed to arise under the laws of the
3 United States.

4 THE COURT: Yes.

5 MS. KEARSE: There is a case in which the
6 Federal Savings and Loan Insurance Corporation com-
7 menced an action in state court which proceeded
8 to judgment and some time thereafter a counter-
9 claim was asserted, a counterclaim in the
10 nature of a recoupment and the FSLIC removed the
11 action to federal court and the motion of the
12 defendant, the plaintiff, on the counterclaim,
13 to remand was denied. That was affirmed on appeal
14 and one of the things that the Court of Appeals
15 said was removal was effected by a special removal
16 statute which gave federal the power to remove any
17 suit to which it was a party, italicizing the word
18 "party."

19 THE COURT: It was the counterclaim that
20 was removed.

21 MS. KEARSE: I believe the general rule is
22 that being a defendant on a counterclaim is not
23 sufficient to give one a right of removal ordin-
24 arily and that was one of the arguments raised by
25 the defendant in that case, was that being a

1 defendant on a counterclaim was not enough to give
2 FSLIC a right of removal. The court pointed out
3 there was a special removal provision which applies
4 to FSLIC as a party, with emphasis on the word
5 "party."

6 That provision is virtually identical to the
7 provision with respect to FDIC.

8 THE COURT: I'm advised there's no legislative
9 history on that. I would think general counsel must
10 have given some recommendation to the Board about
11 why they wanted it and transmitted it to the Banking
12 and Currency or some other committee of the Congress.

13 MS. KEARSE: I would have thought so too,
14 your Honor, but we were not able to find any.

15 THE COURT: What would be the effect if I were
16 to remand? We would have an action in the state
17 court which, except as to Loews, is parallel to the
18 actions that are not before me from the multidistrict
19 panel, isn't that right?

20 MS. KEARSE: Yes, your Honor.

21 THE COURT: Apart from Loews, is there any-
22 thing else in this action which differentiates it
23 from the others where you have moved?

24 MS. KEARSE: I don't believe so.

25 THE COURT: If I were to follow Mr. Wachtell's

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1 suggestion and deny the motion to remand, who is going
2 to appeal to get a determination?

3 MS. KEARSE: FDIC would not.

4 MR. WACHTELL: I guess we would volunteer to
5 intellectually brief the issue as amicus. It's
6 something that should be decided.

7 THE COURT: Yes. Jurisdiction is something
8 the court always, federal court always has to be
9 concerned about.

10 MS. KEARSE: I agree, your Honor. I don't
11 think the withdrawal of the motion by the plaintiff
12 relieves you of the obligation to consider the
13 question.

14 THE COURT: Nobody really arguing against you.

15 MS. KEARSE: I would hate to lose it.

16 THE COURT: It's one of these cases where
17 the practical considerations point to keeping the
18 case here, but the legal considerations have to be
19 analyzed and I don't know. I'm inclined to think
20 I must reserve decision and take another look at
21 these cases, especially since you have the benefit
22 of vigorous argument by those who originally brought
23 the motion to remand.

24 MR. WACHTELL: I don't want to make any
25 vigorous argument, but I think there's no question

1 that the Quinn case, which Miss Kearse cited, does
2 give comfort to her position that at least in an
3 exceptional statute, exceptional case, perhaps a
4 plaintiff can remove.

5 THE COURT: The Quinn case? That's the one
6 Miss Kearse is talking about. I'm not sure that case
7 is dispositive here for a number of reasons, though
8 it certainly is helpful to her position.

9 The first one your Honor has already indicated
10 is that there is a difference between being a plain-
11 tiff defending against a counterclaim, and being a
12 real plaintiff, albeit she's perfectly correct she's
13 not deemed for removal purposes.

14 Secondly, here you have the trustee indicating
15 an intent to realign as plaintiff as well. He would
16 not have an independent basis for federal jurisdiction
17 which serves to complicate it.

18 Third place, I'm not sure the Quinn case is
19 right, because this is a question that your Honor is
20 going to have to--at least--as applied to the facts
21 before your Honor.

22 THE COURT: Does the Quinn case involve mul-
23 tiple defendants? That's the one in 419.

24 MR. WACHTELL: Suit by-- I don't know the
25 multiple defendants.

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1 THE COURT: 419 you said in your brief.

2 MS. KEARSE: Yes.

3 THE COURT: I read it. I thought not squarely
4 in point.

5 MR. WACHTELL: The most troublesome thing I
6 think when you try to apply the Quinn case to the
7 presentation is that I do not read Section 1819 and
8 the any party language as being as broad as Miss
9 Kearse does. She's perfectly right that you have a
10 basic statement that an action to which the FDIC is
11 a party shall be deemed to arise under the laws of
12 the United States. As I read that, that's nothing
13 more than sort of the horn book declaration. This
14 is now a federal question case like any other federal
15 question case, ergo the federal cause of jurisdiction.
16 That's fairly common language in a number of statutes.
17 It's construed we're now dealing with a federal
18 question case.

19 When you then get, and therefore goes ahead to
20 say, "and the United States District Court shall have
21 the original jurisdiction thereof without regard to
22 the amount in controversy," which is a fairly
23 standard statement.

24 It then says, "And the corporation may remove
25 any such action," and that is the language Miss Kearse

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1 is relying upon.

2 The trouble is, your Honor, it says by
3 "following the procedure for removal." When you
4 look to the procedure for removal, you inevitably
5 find yourself with a limitation on the "any such
6 action" language, because the procedure for removal
7 in Section 1446 of Title 28 of course starts off
8 foursquare by saying, "A defendant or defendants
9 desiring to remove," et cetera. The question is, do
10 you take 1819 where it says "any such action" and
11 read that as being all-embracing, even where the
12 FDIC is a plaintiff, or read that as qualifying
13 the initial language of Section 1446, which says
14 a defendant may remove? I'm glad I don't have to
15 call this one.

16 THE COURT: Mr. Finkelstein?

17 MS. KEARSE: Might I add a couple of things
18 in response?

19 THE COURT: Yes.

20 MS. KEARSE: I believe that the interpretation
21 of Section 1446 is generally that it applies prin-
22 cipally to removal under Section 1441, which is the
23 general removal provision. It has been held that
24 when a special removal provision such as 1442 has
25 been used, 1442 being the provision dealing with

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1 federal official, federal officers, that 1446 does
2 not apply insofar as it would otherwise require all
3 of the defendants to remove or to join in the re-
4 moval petition.

5 THE COURT: There was a special reason for that
6 in the case that I looked at, which said that other-
7 wise you could prevent removal of an action against
8 a state officer by fraudulent joinder, which I think
9 is remedial in diversity actions, removal. I guess
10 there is some strength to what you say. I'll con-
11 sider that, too.

12 MS. KEARSE: I point that out just to show
13 that Section 1446 is not ubiquitous in its applica-
14 bility.

15 THE COURT: Yes.

16 MS. KEARSE: I would also like to call the
17 Court's attention to--

18 THE COURT: What is the effect of your letting
19 FDIC as a plaintiff remove? The only reason would
20 be to let you remove an action that was begun before
21 the receiver was appointed, because unless somebody
22 goofed and the FDIC counsel's office brought an
23 action in state court when they wanted to be in the
24 federal court.

25 MS. KEARSE: Yes, your Honor--

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1 THE COURT: It goes into the question of
2 legislative purpose, which I suppose there's no
3 harm in interpreting a statute on the basis of its
4 words without the benefit of interpretive memoranda.

5 MS. KEARSE: Having been unable to find any
6 interpretive memoranda, I think we pretty much have
7 to look to the words of the statute. It certainly
8 is clear that Congress has given FDIC some special
9 responsibilities and some special rights here in
10 terms of getting cases in which it is involved into
11 federal courts. FDIC has the responsibility for
12 winding up the affairs of closed national banks.
13 It is the receiver which must be appointed when any
14 national bank is closed, and I think that the same
15 considerations which suggest or require that a
16 federal official be given the right to remove when-
17 ever he is a defendant apply here whenever FDIC
18 is a party to an action, because in many of these
19 actions in winding up the affairs of closed national
20 banks, FDIC will in effect or in actuality, if
21 there is a realignment, be a plaintiff, and I think
22 that the considerations are really parallel.

23 THE COURT: Does Judge Gelinoff know when
24 he signed the order substituting the receiver he
25 was ousting his court of jurisdiction? I don't know

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1 that it matters.

2 MS. KEARSE: I'm not sure the order was
3 actually ever signed. There was a decision granting
4 the motion.

5 THE COURT: One of these short form orders.

6 MS. KEARSE: A one-sentence decision.

7 THE COURT: Yes, I think you're right.

8 MS. KEARSE: However, the motion is really
9 something of a formal notice. The CPLR says that
10 any time a receiver is appointed for a party, the
11 court shall order substitution. There is, of course,
12 no opposition to the motion. That part of the pro-
13 ceedings really was a formality.

14 THE COURT: Let me get Mr. Finkelstein's
15 point of view on this. If this case is not remanded,
16 you're in the federal court. If it's remanded,
17 you're in the state court--

18 MR. FINKELSTEIN: Yes.

19 THE COURT: You have a right to be at either
20 place.

21 MR. FINKELSTEIN: We would much prefer being
22 in federal court, your Honor.

23 THE COURT: In other words, you're not joining
24 the motion to remand?

25 MR. FINKELSTEIN: Absolutely not, no.

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1 THE COURT: Mr. Wachtel has helped me some
2 because when I'm told you'd like to be here-- But
3 I don't know if you have a right to be here, I have
4 to give some thought to it. I do add something to my
5 job, because if I send it back to the state court
6 the Loews matter would not be before me.

7 I guess I have enough papers on it, and I'll
8 get to work on it and try to move fast on it.

9 Perhaps some counsel for other parties are
10 here. I have drafted a conference memorandum
11 describing what took place at our pretrial conference
12 on May 13th, so we won't have to look through pages
13 and pages of stenographer's transcripts, and that
14 will be circulated early next week, I think, and
15 I have three motions scheduled now, three or four
16 next Friday afternoon. I think Davis Polk requested
17 one of them be put on in the morning. I think I
18 ought to be able to hear them all in the afternoon
19 and not require people who want to know about the
20 case, although they are not interested in that
21 particular one, to be here twice. It's not a holiday
22 weekend, so people should be able to stay until the
23 end of the afternoon if they have to.

24 MR. FINKELSTEIN: Your Honor, we have not yet,
25 as I said, received formal permission to go ahead

1 and move to be realigned. I expect to receive
2 that on Monday. We would thereafter like to file
3 our motion returnable on the 20th, if I may say so,
4 something in the nature of a me-too motion, with
5 respect to the derivative cases, and we would like
6 your Honor's permission to file those papers the
7 beginning of the week.

8 THE COURT: You can file them for the 20th
9 and then liaison counsel can tell me if they think
10 they have inadequate time and want that part
11 adjourned. I'll hear Miss Kearse's motion next
12 Friday, in any event.

13 MR. FINKELSTEIN: We would serve copies on
14 all counsel.

15 THE COURT: What I have said is that in our
16 last conference that people who bring motions must
17 serve them on everybody. Request for adjournment
18 or court interpretation should come through liaison
19 counsel. I'm not sure what happens to liaison counsel
20 for the plaintiffs if Miss Kearse takes the place of
21 the FND and you take the place of the FNC.

22 Anything anybody else wants to bring before
23 me?

24 MR. KOLB: Daniel Kolb; Davis, Polk, your
25 Honor.

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1 Your Honor, I think the note your Honor
2 handed should have said that the various defendants
3 who have motions on next week did reach a consensus
4 and a concern that the number of motions that were
5 on the calendar might preclude hearing a full
6 argument if we confine it to the afternoon. That
7 was not my request alone. If that, the fact it
8 might appear to be my request is on your Honor's
9 view, I would like to clear it up. If you wish us
10 to be here in the afternoon, all of us would be,
11 but it was the thought there was so much to do start-
12 ing at two o'clock it might simply preclude that
13 part of the argument. I do say it does have a lot
14 of people.

15 THE COURT: If not for an emergency matter,
16 I might have been through my motion calendar by twelve
17 today. Maybe I could start the motions at twelve.
18 Any opposition to that? Which one should come first
19 than?

20 MR. KOLB: No clear view as to which one we
21 wanted first. I think there are various views. I
22 think we would probably be inclined to leave that to
23 your Honor.

24 THE COURT: I'll look at it again to see what
25 I can do. I'll get the memorandum out today or
 Monday. That concludes. Thank you very much.

MEMORANDUM AND ORDER DATED JUNE 24, 1975 OF JUDD, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -x

IN RE FRANKLIN NATIONAL BANK
SECURITIES LITIGATION

- - - - -x

JOSEPH J. KANNER,

Plaintiff,

- against -

RAYMOND T. ANDERSEN . . . LOEW'S,
INC., FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver of
FRANKLIN NATIONAL BANK, and
FRANKLIN NEW YORK CORPORATION,

Defendants.

- - - - -x

FILED

MDL # 196

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★

JUN 30 1975

★

TIME AM
PM

75-C-685

June 24, 1975

Appearances:

DEMOV, MORRIS, LEVIN & SHEIN, ESQS.
Attorneys for Plaintiff

By: RAYMOND S. FERSKO, ESQ.
of Counsel

WACHTELL, LIPTON, ROSEN & KATZ, ESQS.
Attorneys for Defendant Loews Corporation

By: HERBERT M. WACHTELL, ESQ.
ALIAN A. MARTIN, ESQ.
of Counsel

HUGHES, HUBBARD & REED, ESQS.
Attorneys for Federal Deposit Insurance
Corporation as Receiver of Franklin National Bank

Memorandum and Order Dated June 24, 1975

By: AMALYA L. KEARSE, ESQ.
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BARRETT, SMITH SCHAPIRO & SIMON, ESQS.
Attorneys for Sol N. Corbin, as
Trustee in Bankruptcy of
Franklin New York Corporation

By: MICHAEL O. FINKELSTEIN, ESQ.
of Counsel

J U D D, J.

MEMORANDUM AND ORDER

This motion to remand a stockholders' derivative action to the state court presents an unusual situation. The movant withdrew his motion in open court at the time of argument, but this court must nevertheless consider whether federal jurisdiction actually exists.

Facts

The action was begun in Supreme Court, New York County, by a stockholder of Franklin New York Corporation (FNY). The summons against the defendants was dated August 16, 1974.

FNY owned all the stock of Franklin National Bank (the Bank). Plaintiff had been a stockholder of the Bank before its acquisition by FNY.

The individual defendants include directors and officers of both FNY and the Bank. They are charged with

Memorandum and Order Dated June 24, 1975

having permitted defendant Michele Sindona and defendant Fasco International Holding, S.A. (Fasco), a corporation controlled by him, to obtain control of the Bank, to make improvident loans in excessive amounts, to participate in underwritings for the benefit of Sindona and Fasco, and to conduct imprudent, wasteful and illegal foreign exchange transactions resulting in losses in excess of \$45,000,000, and threatening the solvency of the Bank.

The charge against defendant Loews Corporation (sued as Loew's, Inc.) was that having owned about 22 percent of the FNY stock, it sold such stock to Sindona and Fasco without proper investigation into their true intent to act to the detriment of the FNY and the Bank. The prayer for relief was that the defendants account for their profits and reimburse FNY and the Bank for their damages, plus attorneys' fees. The action was thus a derivative action on behalf of FNY and a double derivative action on behalf of the Bank.

Franklin National Bank was declared insolvent by the Comptroller of the Currency of the United States on October 8, 1974, and Federal Deposit Insurance Corporation (FDIC) was appointed as Receiver on that same date.

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FDIC thereafter moved in the state court to be substituted as a defendant in the place of the Bank, and the motion was granted on December 5, 1974. Promptly thereafter, on December 12, 1974, FDIC filed a verified petition for removal in the United States District Court for the Southern District of New York. No other defendant joined in FDIC's petition for removal. FDIC's motion was countered on December 16, 1974 by a motion of plaintiff to remand the action to the Supreme Court, New York County. Defendant Loews Corporation filed a memorandum of law in support of the motion to remand.

The motion to remand was held in abeyance pending consideration by the Judicial Panel on Multidistrict Litigation of ten separate actions arising from the Bank's failure. That Panel on April 30, 1975 ordered that all the actions be transferred to this court for coordinated or consolidated pretrial proceedings, pursuant to 28 U.S.C. §1407. With respect to the motion to remand the Kanner action, the Multidistrict Panel stated that the transferee judge could resolve the remand issue.

The actions covered by the ruling of the Multidistrict Panel include four derivative damage actions on behalf

Memorandum and Order Dated June 24, 1975

of FNY shareholders, five alleged class actions by purchasers of FNY securities, and an injunctive action by the SEC. All except the Kanner action were originally filed in the federal courts for this District or for the Southern District of New York. All but two of the 24 defendants in the Kanner action (Loews and Fasco) are also defendants in one or more of the other actions.

FDIC has moved to realign itself as a party-plaintiff in this action and to be granted exclusive control over prosecution of the claims asserted on behalf of the Bank. Like motions have been made in two similar derivative actions: Rothman v. Andersen (74-C-894) and Ratner v. Franklin National Bank (74-C-1174). The trustee of FNY has been granted permission by the Bankruptcy Court for the Southern District of New York to take over the Kanner action insofar as it alleges claims on behalf of FNY.

On the day the motion to remand was argued in this court, plaintiff's counsel stated that he had decided to withdraw the motion, because all the other cases were in this court.

After the transfer of the cases to this court for pretrial purposes, liaison counsel were designated by the plaintiffs and were recognized by this court at its first

Memorandum and Order Dated June 24, 1975

pretrial conference. All counsel agreed at that time that discovery depended largely on documents from two sources. The Securities and Exchange Commission has gathered many documents, as well as obtaining investigatory interviews. FDIC has the files of both the Bank and FNY and is assembling those pertinent to the litigation.

Loews moved in the Southern District to dismiss the complaint against it. Action on that motion awaits action on this motion to remand. In this court, although it was less concerned with the motion to remand in view of the new role of FDIC and the Trustee of FNY, Loews argued in support of the motion, for fear that a lack of jurisdiction of the federal court might impair the finality of any decree rendered in the action.

Statutes

FDIC's petition for removal was filed under 12 U.S.C. § 1819 Fourth, which specifies that FDIC can sue or be sued in any court, state or federal, but that all civil actions to which it is a party "shall be deemed to arise under the laws of the United States," and that

Memorandum and Order Dated June 24, 1975

[T]he Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank . . . shall not be deemed to arise under the laws of the United States.

Removal procedure is specified in Chapter 89 of Title 28 of the United States Code. Section 1441(a) provides that

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants . . .

Section 1446(b) provides that the petition for removal shall be filed within thirty days after the receipt by the defendant of a copy of the initial pleading or within thirty days after receipt "of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

Section 1442 contains a special removal provision covering a civil action in a state court against

- (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office

Memorandum and Order Dated June 24, 1975

Discussion

This is a case of first impression under the FDIC removal statute.

As a general rule, a defendant cannot remove an action unless all defendants join in the motion or petition. Wright v. Missouri Pacific Railroad Co., 98 F.2d 34 (8th Cir. 1938). As a general rule also, a plaintiff may not remove an action, since 28 U.S.C. § 1446 refers to removal only by a "defendant or defendants."

These rules should yield, however, to special removal statutes. See 1A Moore, Federal Practice, 2d ed, 1974, 0.168[3.-2] at p. 455. For instance, under Section 1442 a federal officer may remove the entire action without the necessity of any other defendant joining in the petition. Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960).

An exception to the general limitations on removal was recognized in Federal Savings & Loan Insurance Corp. v. Quinn, 419 F.2d 1014, 1018 (7th Cir. 1969), which involved a special removal statute, 12 U.S.C. § 1730(k)(1) parallel to the Federal Deposit Insurance Act. There the issue was whether a counterclaim brought after the corporation sued in the state court could be removed to the federal court. The court recog-

Memorandum and Order Dated June 24, 1975

nized that generally a defendant on a counterclaim is not a defendant for removal purposes. Barrow v. Hutton, 99 U.S. 80 (1879). However, since the FSLIC statute, like the FDIC statute, permitted removal of any suit to which the corporation was "a party," the removal was held proper. The issue in the Quinn case was not the precise issue presented here, but Quinn confirms that the normal limitations need not apply to special removal statutes.

There are no legislative memoranda to explain the purpose of 12 U.S.C. § 1819. The language should be interpreted, however, in relation to previously existing removal statutes. Since the previously existing removal statutes permitted removal of any case where a federal question was involved, the 1966 amendment could have provided for removal by simply stating that FDIC cases arise under the laws of the United States. The additional provision for removal of any such action must have been intended to grant broader removal powers than would otherwise exist. It is also significant that the removal privilege was not extended to cases where FDIC acts as receiver of a state bank.

Insofar as Section 1819 provides for FDIC's "following any procedure for removal," there has been compliance

Memorandum and Order Dated June 24, 1975

with §1446 with respect to the form of the petition and the time of filing, since it was filed within thirty days after the case first became removable by FDIC's substitution as a party. The quoted phrase does not require imposing any other limitations on removal.

The wide ranging power of federal courts over national banks justifies a broad interpretation of the removal statute.

The claims affecting FDIC are not separable from the claims of FNY. The damage alleged to FNY is based on alleged mismanagement of the Bank. Remand of part of the case under 28 U.S.C. § 1441(c) would therefore be impractical and improper.

The question of this court's jurisdiction is sufficiently important so that the parties should have a right to obtain a prompt review in the Court of Appeals if they wish. It is the court's opinion that the order denying remand involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order, pursuant to 28 U.S.C. § 1292(b), may materially advance the ultimate determination of the litigation.

Memorandum and Order Dated June 24, 1975

It is ORDERED that the motion to remand be deemed withdrawn by the plaintiff, and that it is denied insofar as it was joined in by defendant Loews Corporation.

U. S. D. J.

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ORDER DATED JULY 8, 1975 BY JUDD, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
In re : M.D.L. #196
FRANKLIN NATIONAL BANK : (O.G.J.)
SECURITIES LITIGATION :
----- x

IRVING ROTHMAN, :
Plaintiff, : 74-C-894

-against- :
RAYMOND T. ANDERSEN, et al., :
Defendants. : ORDER
----- x

LILLIAN RATNER, et al., :
Plaintiffs, : 74-C-1174
-against- :
FRANKLIN NATIONAL BANK, et al., :
Defendants. :
----- x

LOUIS PERGAMENT, et al., :
Plaintiffs, : 74-C-1451
-against- :
FRANKLIN NATIONAL BANK, et al., :
Defendants. :
----- x

JOSEPH J. KANNER, :
Plaintiff, : 75-C-685
-against- :
RAYMOND T. ANDERSEN, et al., :
Defendants. :
----- x

Upon the notice of motion of the Federal Deposit
Insurance Corporation, dated June 9, 1975, for an order in

Order Dated July 8, 1975 by Judd, J.
each of the captioned actions except Louis Pergament et al.
v. Franklin National Bank, et al. ("Pergament"), (1) realigning
Federal Deposit Insurance Corporation as Receiver ("Receiver")
of Franklin National Bank ("the Bank") as party plaintiff,
(2) substituting Federal Deposit Insurance Corporation in
its corporate capacity ("FDIC") for the Receiver, (3) granting
FDIC exclusive control over the prosecution of the claims
asserted on behalf of the Bank, and dismissing the shareholder-
plaintiffs as parties thereto, and (4) consolidating the actions
for all purposes, except as modified by stipulation, So Ordered
by the Court on June 20, 1975, to exclude from consolidation
the claim asserted against Loews Corporation ("Loews") in
Kanner v. Andersen, et al., 75-C-685 ("Kanner"); and upon the
affidavit of W. Norman Davis, sworn to June 9, 1975, in support
of said motion;

AND upon the notice of motion of Sol Neil Corbin
as Trustee in Bankruptcy ("Trustee") for Franklin New York
Corporation ("FNYC"), dated June 18, 1975, for an order in
each of the captioned actions, (1) substituting the Trustee
for FNYC, (2) realigning the Trustee as party plaintiff, and
(3) granting the Trustee exclusive control over the prosecution
of the claims asserted on behalf of FNYC and dismissing the
shareholder-plaintiffs as parties thereto; and upon the affi-
davit of Michael F. Armstrong, sworn to June 18, 1975, in
support of said motion;

AND after hearing argument in support of, and in
opposition to, said motions, it is hereby

ORDERED, that the motion of Federal Deposit Insurance
Corporation be and it is hereby granted to the extent that in each
of the captioned actions except Pergament, (1) the Receiver is
realigned as party plaintiff, (2) FDIC is substituted for the

Order Dated July 8, 1975 by Judd, J.

Receiver as party plaintiff, (3) FDIC is granted exclusive control over the prosecution of all claims asserted on behalf of the Bank, and (4) said actions are consolidated for all purposes in the Eastern District of New York under the title of Rothman v. Anderson, et al., 74-C-894, except that the claim asserted against Loews in Kanner is excluded from said consolidation; and it is further

ORDERED, that the motion of the Trustee be and hereby is granted to the extent that in each of the captioned actions (1) the Trustee is substituted for FNYC, (2) the Trustee is realigned as party plaintiff, and (3) the Trustee is granted exclusive control over the prosecution of all claims asserted on behalf of FNYC for injury to FNYC in its own right and not derivatively for injury to the Bank; and it is further

ORDERED, that to the extent that claims are asserted on behalf of FNYC in its own right and not derivatively on behalf of the Bank in Pergament, said action is consolidated for all purposes in the Eastern District of New York with the other captioned actions; and it is further

ORDERED, that the motions of Federal Deposit Insurance Corporation and the Trustee to dismiss the shareholder-plaintiffs as parties to the prosecution of the claims asserted on behalf of the Bank and FNYC, respectively, be and they hereby are denied; and it is further

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

ORDERED that no determination is made at this time concerning which

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
claims are asserted only on behalf of FNY in its own right, or concerning the effect of any determination by FDIC or the Trustee not to proceed with the claim against defendant Loews Corp. in the Kanner action.

U.S. District Court, E.D. NY
Dated: Brooklyn, New York
July 8, 1975

TIME AM

[Signature]
U.S. P. J.

Copy Received
Hughes Hubbard & Reed
12:30 September 7, 1975

